

Advance Questions for Frank R. Jimenez
Nominee for the Position of General Counsel
of the Department of the Navy

Defense Reforms

The Goldwater-Nichols Department of Defense Reorganization Act of 1986 and the Special Operations reforms have strengthened the warfighting readiness of our Armed Forces. They have enhanced civilian control and clearly delineated the operational chain of command and the responsibilities and authorities of the combatant commanders, and the role of the Chairman of the Joint Chiefs of Staff. They have also clarified the responsibility of the Military Departments to recruit, organize, train, equip, and maintain forces for assignment to the combatant commanders.

Do you see the need for modifications of any Goldwater-Nichols Act provisions?

Answer: The Goldwater-Nichols Act strengthened the civilian leadership of the Department of Defense and improved the clarity of the chain of command. Implementation of Goldwater-Nichols has enhanced the ability of the Services to act quickly and jointly. Although I am currently unaware of any reason to amend Goldwater-Nichols, if confirmed I will have the opportunity to assess the Act and propose changes.

If so, what areas do you believe might be appropriate to address in these modifications?

Answer: Please see responses to previous question.

Duties

What is your understanding of the duties and functions of the General Counsel of the Department of the Navy?

Answer: Section 5019 of title 10, United States Code, provides that the General Counsel of the Department of the Navy shall perform such functions as the Secretary of the Navy may prescribe. The Secretary has done so through regulations, instructions, and memoranda. The General Counsel is the chief legal officer of the Department, and legal opinions issued by the General Counsel are the controlling legal opinions within the Department. The General Counsel provides legal advice, counsel and guidance to the Secretary, the Under Secretary and the Assistant Secretaries, and their staffs. He is also responsible for providing legal services throughout the Department in a variety of fields,

including business and commercial law, real and personal property law, fiscal law, civilian personnel and labor law, intellectual property law, environmental law, and litigation. In addition, the General Counsel serves as the Debarring Official and Designated Agency Ethics Official for the Department, and assists the Under Secretary of the Navy in overseeing the Naval Criminal Investigative Service.

What background and experience do you possess that you believe qualifies you to perform these duties?

Answer: The Office of the General Counsel in the Department of the Navy has an extraordinarily broad range of responsibilities, including litigation, contracts, acquisition, environmental, personnel, legislative, ethics and other issues. Though it is not possible for any attorney to master them all, the General Counsel must possess sound legal and analytical skills, as well as sound integrity and judgment. The Office of General Counsel is also quite large, with more than 600 attorneys in over 100 locations worldwide. Accordingly, the General Counsel must possess strong managerial qualifications and solid interpersonal and leadership abilities. I believe that my experiences and background have prepared me well to perform the duties of this office.

I received my undergraduate degree from the University of Miami in 1987 and my law degree from the Yale Law School in 1991, where I served as a notes editor of the Yale Law Journal and won the Harlan Fiske Stone Prize (Best Oralist) and Benjamin N. Cardozo Prize (Best Brief) in the Yale Moot Court of Appeals. After law school, I clerked for Judge Pamela Ann Rymer of the U.S. Court of Appeals for the Ninth Circuit in Pasadena, California. I subsequently joined the Miami office of Steel Hector & Davis LLP, where I practiced general commercial litigation and white collar criminal defense in state and federal courts. A year after becoming a partner of the firm, I was asked to join the staff of newly-elected Governor Jeb Bush as Deputy General Counsel. In my three and a half years on the Governor's staff, I also served at various times as Acting General Counsel and Deputy Chief of Staff, helping in the latter position to supervise executive agencies covering the environment, transportation, health, business regulation, land use and emergency management. In 2002, I became Chief of Staff at the U.S. Department of Housing and Urban Development, assisting then-Secretary Mel Martinez in managing more than 9,000 employees and an annual budget surpassing \$30 billion. For the last two years, I've served in the U.S. Department of Defense, first as Principal Deputy General Counsel of the Department of the Navy, then as Deputy General Counsel (Legal Counsel) of the U.S. Department of Defense. I recently graduated with an MBA from the Wharton School at the University of Pennsylvania.

This experience in both legal and managerial positions in the public and private sectors has prepared me to address the wide array of challenges and responsibilities faced by the General Counsel of the Department of the Navy. In particular, I believe my experience as Principal Deputy General Counsel for the Department of the Navy in 2004-05 will serve me and the Office of General Counsel in good stead if I am confirmed. During my year in Navy OGC, I developed many relationships and a large volume of working

knowledge that will allow me to assume the duties of General Counsel quickly and effectively.

Do you believe that there are actions you need to take to enhance your ability to perform the duties of the General Counsel of the Department of the Navy?

Answer: I believe that I possess the essential legal expertise and leadership skills to be the General Counsel of the Department of the Navy. As Deputy General Counsel (Legal Counsel) of the Department of Defense, I have enhanced my understanding of the relationships between the Office of the Secretary of Defense, the military departments, the defense agencies, and their respective legal communities. During my service as Principal Deputy General Counsel of the Department of the Navy, I became very familiar with the Department's leadership and organization, its uniformed and civilian attorneys, and the legal challenges facing the Department. If confirmed as the General Counsel, I will continue to rely heavily on the wisdom and knowledge of those who have devoted themselves to service in the Navy and Marine Corps, as well as the career civil servants in the Department.

Assuming you are confirmed, what duties and functions do you expect that Secretary Winter would prescribe for you?

Answer: If confirmed, I expect that Secretary Winter will desire my candid and objective legal advice concerning issues, opportunities and problems as they arise. I anticipate that my formal responsibilities as General Counsel of the Department of the Navy will remain largely as they are currently. I also anticipate that Secretary Winter will expect me to continue the exemplary relationship between the General Counsel, the Judge Advocate General of the Navy, and the Staff Judge Advocate to the Commandant of the Marine Corps, in order to ensure the faithful execution of the laws throughout the Department of the Navy and the successful accomplishment of the Department's mission. I expect to work closely with the General Counsels of the Department of Defense, other military departments, defense agencies, and other federal agencies, and with the Congress, on matters of mutual interest or concern.

In carrying out your duties, how will you work with the General Counsel of the Department of Defense?

Answer: While the General Counsel of the Department of the Navy reports to the Secretary of the Navy, the General Counsel of the Department of Defense is the chief legal officer of the Department of Defense. If confirmed, I will work closely with the General Counsel of the Department of Defense on matters of mutual interest or concern.

Relationship with the Judge Advocate General

In carrying out your duties, how will you work with the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps?

Answer: The General Counsel, the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps must have relationships marked by full consultation, open communication, close and collegial cooperation, and careful coordination. These relationships are essential to ensure the faithful execution of the laws throughout the Department. In my experience as Principal Deputy General Counsel, I found the existing relationships to be truly extraordinary, and of great benefit to our clients throughout the Department. If confirmed, I am confident that these close and collegial relationships will continue.

How are the legal responsibilities of the Department of the Navy allocated between the General Counsel, the Judge Advocate General, and the Staff Judge Advocate to the Commandant of the Marine Corps?

Answer: The Department of the Navy is unique among the military departments, because it is served by three legal communities: the General Counsel and Office of the General Counsel, the Judge Advocate General of the Navy and Navy Judge Advocates, and the Staff Judge Advocate to the Commandant of the Marine Corps and Marine Judge Advocates. The governance model for legal services within the Department of the Navy is founded upon close professional and personal relationships between the General Counsel, the Judge Advocate General of the Navy, and the Staff Judge Advocate to the Commandant of the Marine Corps – relationships that emphasize communication, transparency, and mutual support. The General Counsel is the principal legal advisor to the Secretary of the Navy, the Assistant Secretaries, and their staffs, and is the head of the Office of the General Counsel. In addition, the General Counsel exercises other special authorities by delegation or direction from the Secretary of the Navy, or by law or regulation. For example, the General Counsel is the reporting senior for the Director of the Naval Criminal Investigative Service, acts as the Designated Agency Ethics Official for the Department of the Navy, and administers the Department's alternative dispute resolution and acquisition integrity programs. The Office of the General Counsel's practice includes business and commercial law, environmental law, personnel and labor law, fiscal law, intellectual property law, and ethics, among other subjects. The Judge Advocate General of the Navy also reports directly to the Secretary of the Navy, and generally provides legal services in the areas of military justice, international law, matters associated with military operations, environmental law, military personnel law, administrative law, claims, and ethics. The Staff Judge Advocate to the Commandant of the Marine Corps is the senior military lawyer to the Commandant, and his responsibilities largely parallel those of the Judge Advocate General of the Navy. The responsibilities of the General Counsel, the Judge Advocate General, and Staff Judge Advocate to the Commandant will overlap from time to time. In such instances, the three legal communities address matters by working closely together for the benefit of the Department.

Major Challenges

In your view, what are the major challenges that will confront the General Counsel of the Department of the Navy?

Answer: I believe that the General Counsel's greatest challenge will be to deliver timely, responsive, and accurate legal advice as the Department of the Navy addresses two fundamental, emerging issues: the conduct of global, asymmetric warfare, and the execution of strategic and commercial transformation initiatives. To meet the Department's needs in these areas, the General Counsel likely will address matters concerning acquisition reform, privatization, oversight of intelligence, environmental law and policy, and military and civilian personnel law and policy. If confirmed, I will work, in cooperation with the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps, to ensure that the legal communities of the Department of the Navy have the resources necessary to meet the diverse and changing needs of their clients.

Assuming you are confirmed, what plans do you have for addressing these challenges?

Answer: If confirmed, I will review the resources, organization and operation of the Office of the General Counsel, and implement whatever changes may be necessary to enhance its ability to confront these challenges. I will work to maximize coordination and cooperation with all stakeholders. I will also continue or enhance the previous General Counsel's initiatives on career development and performance measurement.

Priorities

The Navy and Marine Corps are engaged on a daily basis in combat and combat support in Operations Iraqi Freedom and Enduring Freedom, restructuring and recapitalizing in accordance with the goals of the Quadrennial Defense Review, reducing Navy active-duty and reserve end strengths, and transforming the Department of the Navy's Total Force to deal with a host of traditional and non-traditional threats to the security of the nation.

In what ways can you, if confirmed as General Counsel, contribute to military readiness and the success of the Navy and Marine Corps?

Answer: If confirmed, I will strive to deliver effective and innovative legal services to assist the Secretary of the Navy in carrying out his statutory responsibility to recruit, organize, supply, equip, train, service, mobilize, demobilize, administer, and maintain, all in the interest of promoting readiness across the Navy and Marine Corps. In this regard, I would work closely with the Secretary and the senior leadership of the Department to

ensure that the priorities of the Office of the General Counsel are aligned with those of its clients.

What broad priorities would you establish, if confirmed, in terms of issues which must be addressed by the Office of the General Counsel of the Department of the Navy?

Answer: My foremost priority will be to ensure that the Department of the Navy receives the highest quality legal advice and services in the most efficient manner, and that uniformed and civilian attorneys work together to accomplish that goal. If confirmed, I will further explore and develop more defined priorities.

Attorney Recruiting and Retention Issues

How do you assess your ability to hire and retain top quality attorneys and provide sufficient opportunity for advancement?

Answer: I believe that the Department of the Navy continues to hire outstanding civilian attorneys. The Office of the General Counsel receives a large volume of applications, and competition for employment remains intense. Nonetheless, the increasing financial disparity between Government attorneys and privately employed attorneys is a challenge. If confirmed, I will work with the senior staff of the Office of the General Counsel to address these issues. I will also enhance the previous General Counsel's initiatives on career development.

In your view, does the Department of the Navy have a sufficient number of attorneys to perform its missions?

Answer: I believe that the Department of the Navy has a sufficient number of civilian and military attorneys to perform its missions. The demand for civilian attorneys and judge advocates has grown significantly, however, both generally and in response to specific emerging issues. In this era of intense media scrutiny, complex national security questions in domestic and international law, environmental concerns, and the penchant of many to litigate, there is an increasing demand for sophisticated, specialized legal services. If confirmed, I will work with the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps to ensure the Department has a sufficient number of lawyers to meet its needs.

In your view, what incentives to successful recruiting and retention of attorneys, if any, need to be implemented or established?

Answer: The competition for legal talent is keen, and law students typically enter the job market burdened by substantial debt. Initiatives by the Congress and the Department of the Navy have helped to alleviate some of the financial pressures facing our young judge advocates, and have improved retention. Similar incentives are not currently available to

civilian attorneys, but the Department of the Navy Office of the General Counsel offers appointments to new attorneys at grade levels that are highly competitive with other federal agencies. This may account, in part, for the Office of the General Counsel's continued success in recruiting and retaining highly competent attorneys. If confirmed, I will work with the senior staff of the Office of the General Counsel to address these issues.

BRAC

In 2005, the Base Realignment and Closure process was concluded, and the BRAC Commission's recommendations enacted. These decisions will close or realign significant numbers of military installations, increasing the military value of our infrastructure, transforming certain common functions across the Department, and saving valuable resources.

Now that those recommendations have the force and effect of law, how would you approach implementation of those recommendations if you are confirmed?

Answer: I understand that the Department of Defense must fully implement the recommendations of the BRAC Commission within six years, as required by law. I also understand that the Department of the Navy, in order to execute its own BRAC 2005 recommendations and a number of joint, cross-service group recommendations as directed by the Under Secretary of Defense (Acquisition, Technology and Logistics), is developing implementation plans and associated budget materials. BRAC 2005 is vitally important to the Department of the Navy, because it will allow the Department to reduce excess infrastructure (allowing scarce dollars to be moved to areas that result in improved readiness) and to transform the remaining infrastructure.

Military Justice Matters

Article 6 of the Uniform Code of Military Justice gives primary jurisdiction over military justice to the Judge Advocates General of the Army, Navy, and Air Force.

How do you view your responsibilities in the performance of military justice matters with regard to the Judge Advocate General of the Navy?

Answer: In Article 6, Congress gave the Judge Advocate General of the Navy or other senior members of his staff the responsibility to "make frequent inspections in the field in supervision of the administration of military justice." If confirmed, as the chief legal officer of the Department of the Navy, I will have an interest in the administration of military justice. I envision a close working relationship with the Judge Advocate General

of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps, in which we share information and work collaboratively when necessary to resolve issues of policy and matters pertaining to specific cases. I believe that a close working relationship with the Judge Advocate General and Staff Judge Advocate to the Commandant, and reliance on their special expertise, will enable us collectively to avoid any potential issues of command influence.

Treatment of Detainees

What is your understanding of the definition of “humane treatment” of detainees?

Answer: The President's Military Order, November 13, 2001, requires that detainees be treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria; afforded adequate food, drinking water, shelter, clothing and medical treatment; and allowed the free exercise of religion consistent with the requirements of detention.

The recently enacted Detainee Treatment Act of 2005 requires that no individual in the custody or under the physical control of the United States Government, regardless of physical location, shall be subjected to cruel, inhuman, or degrading treatment or punishment.

The Deputy Secretary of Defense issued guidance on July 7, 2006 stating that the U.S. Supreme Court, in *Hamdan v. Rumsfeld*, --- S.Ct. ----, 2006 WL 1764793 (U.S.) (June 29, 2006) ("*Hamdan*"), determined that Article Three Common to the Geneva Conventions of 1949 ("Common Article Three") applies as a matter of law to the conflict with al Qaida.

Congress may further define the responsibilities of the United States under Common Article Three in any future legislation adopted in response to the *Hamdan* decision.

What is the role of the General Counsel of the Department of the Navy in ensuring that all detainees in the custody of U. S. Armed Forces are provided humane treatment?

Answer: Under the Detainee Treatment Act of 2005, any individual under the control of the Department of the Navy (or any other component of the Department of Defense) must be treated humanely and kept from being subjected to cruel, inhuman, or degrading treatment or punishment, including individuals held as a result of counterdrug operations (South/Central America), migrant operations, law enforcement operations, and armed conflict. In this regard, the role of the General Counsel is to provide guidance to the Department of the Navy regarding its obligations under the Detainee Treatment Act and all other sources of legal obligation toward detainees.

Regarding current detention operations in Guantanamo Bay, Cuba, Afghanistan, and Iraq, the Combatant Commanders plan, execute, and oversee Combatant Command detention operations. The Chairman of the Joint Chiefs of Staff provides oversight to the Combatant Commanders to ensure their detention operations, policies and procedures are consistent with DoD policies and requirements.

The Secretary of the Army is the Executive Agent for detention operations. The Army is in the process of revising AR 190-8, the "tri-service" detainee regulation.

The Under Secretary of Defense for Policy (USD(P)) is responsible for developing, reviewing, and coordinating all DoD policy pertaining to the DoD Detainee Program. In July 2004, the Secretary of Defense established the Office of Detainee Affairs under the USD(P) to serve as the focal point for all detention policy matters.

What is the role, if any, of the General Counsel of the Department of the Navy in ensuring that interrogation policies under the United States Army Field Manual on Intelligence Interrogations, including any revisions to the current field manual, are consistent with the Detainee Treatment Act of 2005?

Answer: The Department of the Army is responsible for providing doctrinal guidance concerning the Army Field Manual 34-52, "Intelligence Interrogations." The revision to FM 34-52, FM 2-22.3, "Human Intelligence Collector Operations," is in the process of coordination throughout the Department of Defense. It is my understanding that the Department of Navy, including the Office of General Counsel, has had an opportunity to provide comments concerning this draft publication. The role of the General Counsel of the Department of the Navy is to advise officials of the Department of the Navy in their review of the draft Army Field Manual and in their efforts to ensure that all Department of the Navy personnel comply with the final version.

Should any credible allegations of abuse during detainee intelligence interrogations come to the attention of the General Counsel of the Department of the Navy, he or she should immediately report such allegations to superiors and follow through until the matter is satisfactorily resolved.

Consolidation of Military and Civilian Legal Staffs

On September 10, 2001, Secretary Rumsfeld initiated a "war on bureaucracy" stating that in order to make decisions more quickly, the Department must slash duplication, encourage cooperation, and start asking tough questions about redundant staff. He noted: "There are dozens of offices of general counsel scattered throughout the Department. Each service has one. Every agency does, too. So do the Joint Chiefs. We have so many general counsel offices that we actually have another general counsel's office whose only job is to coordinate all those general counsels."

What is your understanding of actions that have been taken in the Department of Defense and Department of the Navy to address the Secretary's concerns?

Answer: As a DoD Deputy General Counsel and as Principal Deputy General Counsel of the Department of the Navy, I have worked closely with my counterparts in the military departments and other components of the Department of Defense to ensure consistency of approach and eliminate duplication of effort. I share the Secretary of Defense's interest in the good stewardship of scarce legal resources.

In your judgment, what actions need to be taken, if any, in response to Secretary Rumsfeld's challenge?

Answer: If confirmed, with the guidance of the Secretary of the Navy, and in close cooperation with the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps, I would work to achieve an efficient allocation of legal resources across the Department of the Navy. It is critical not only to avoid duplication of effort, but also to align legal organizations in a manner that best serves the changing needs of our clients.

Do you believe that the Department of the Navy has the legal resources necessary to carry out the missions that may be required of it in wartime? If not, what is needed?

Answer: In wartime, the needs of the Department of the Navy place great demands on both uniformed and civilian attorneys. Although I believe that the Department of the Navy has the legal resources available to execute its missions, the increasing pressure to support the Department's operations, at home and abroad, demands careful attention. If confirmed, I will work with the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps to ensure that the legal communities of the Department of the Navy continue to meet the needs of their clients.

Religious Guidelines

What is your legal assessment of the measures being taken by the Department of the Navy to provide religious guidelines aimed at ensuring that members of the chaplain corps of the Navy ensure religious tolerance and respect?

Answer: It is my understanding that the Navy's guidelines on religion ensure religious tolerance and respect. If confirmed, I will continue to support the Navy's firm

commitment to striking the proper Constitutional balance between the two tenets of the “free exercise” and “establishment” clauses.

What is your legal assessment of Department of the Navy guidance regarding chaplain prayers during official functions other than worship services with respect to praying according to the manner and forms of the church of which the chaplain is a member?

Answer: Military Chaplains are trained to be sensitive to facilitate the ministry of members of their own faiths, the members of other faiths and to care for all service members. At command functions, other than for the purpose of religious worship, chaplains are encouraged to be especially sensitive to and inclusive of the diversity of faiths of persons attending the functions. Chaplains are not ever compelled to offer prayers inconsistent with their faith and, as such, are free to decline participation, with no adverse consequences, in a command event at which a commander determines the prayer should be inclusive. In my mind, this is an appropriate balance between the rights of the individual members, the chaplains and the Commander's need to preserve good order and discipline.

What is your legal assessment of the adequacy of Departmental guidance to commanders and other leaders regarding free exercise of religion in the Navy and Marine Corps?

Answer: I am informed that Departmental guidance provides commanders and other leaders ample guidance regarding the free exercise of religion in the Navy and the Marine Corps. Secretary of the Navy Instruction 1730.7C, Religious Ministry Within the Department of the Navy, “The Department of the Navy Guidelines on Religious Ministry,” and DoD Directive 1300.17, Accommodation of Religious Practices Within the Military Services, provide detailed guidance on the important responsibilities of commanders and leaders in this regard. It is my understanding that these policies are consistent with the First Amendment.

General and Flag Officer Nominations

Under DOD Instruction 1320.4, adverse and alleged adverse information pertaining to general and flag officers must be evaluated by senior leaders in the Services and in the Office of the Secretary of Defense prior to nomination.

If confirmed, what role, if any, would you play in the officer promotion system, particularly in reviewing general and flag officer nominations?

Answer: If confirmed, my role will be as directed by the Secretary of the Navy. I will work closely with the Secretary of the Navy, the Assistant Secretary of the Navy

(Manpower and Reserve Affairs), the Judge Advocate General of the Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, and other senior Department of the Navy leaders to ensure that the Department of the Navy's military personnel policies are formulated and applied uniformly, fairly, and in accordance with applicable laws and regulations. Generally, legal review of military personnel matters is under the cognizance of the respective service judge advocates. I understand that officer promotion matters in the Department of the Navy (both Navy and Marine Corps) are under the purview of the Secretary and that the Judge Advocate General has cognizance over legal review of promotion plans, precepts that govern the conduct of promotion selection boards, subsequent promotion selection board reports, and review of adverse information.

What is your understanding of the role of the General Counsel of the Department of the Navy in ensuring the legal sufficiency of statutory selection board processes?

Answer: Under Chapter 36 of Title 10, United States Code, the Secretary of the Navy is responsible for the proper functioning of the Department of the Navy's promotion selection process. If confirmed, my role will be as directed by the Secretary of the Navy. Generally, military personnel matters are under the cognizance of the respective service judge advocates. I envision a close working relationship with the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps, and Office of Counsel for the Commandant, an office under my supervision, in which we work collaboratively, when necessary, to resolve issues of policy and matters pertaining to specific cases.

What is the role, if any, of the General Counsel of the Department of the Navy in reviewing and providing potentially adverse information pertaining to a nomination to the Senate Armed Services Committee?

Answer: It is my understanding that within the Department of the Navy, the Judge Advocate General reviews each situation where adverse, or potentially adverse, information involving an officer may exist prior to the nomination of such officer being presented to the Senate, in order to ensure that any reports and communications comply in form and substance with law and regulation. When requested, the General Counsel's office will provide advice on cases of Department of the Navy nominees with adverse, or potentially adverse, information, in order to ensure that such information is reported to the Senate Armed Services Committee.

Military Personnel Policy and Cases

In your view, what role, if any, should the General Counsel play in military personnel policy and individual cases, including cases before the Board for Correction of Naval Records?

Answer: If confirmed, my role will be as directed by the Secretary of the Navy. I will work closely with the Secretary of the Navy, the Assistant Secretary of the Navy (Manpower and Reserve Affairs), and other senior Department of the Navy leaders to ensure that the Department of the Navy's military personnel policies are formulated and applied uniformly, fairly, and in accordance with applicable laws and regulations. In the event I become aware of individual cases in which military personnel policies were not fairly and lawfully applied, and it is proper for me to intervene, I will take appropriate action. If confirmed, I will coordinate with the Assistant Secretary of the Navy (Manpower and Reserve Affairs), who exercises overall supervision of the Navy Board for Correction of Military Records, to ensure the Board receives full and comprehensive legal support.

Sexual Assault Prevention and Response Policy

Numerous cases of sexual misconduct have been reported within the Armed Services over the last several years. Many victims and their advocates contend that they were victimized twice: first by attackers in their own ranks and then by unresponsive or inadequate military treatment. They asserted that the military failed to provide basic services available to civilians who have been raped, including proper medical attention, adequate criminal investigations of their charges, and timely prosecution.

What is your view of the systems and programs the Navy and Marine Corps have in place in deployed locations to offer victims of serious sexual assaults the medical, psychological, and legal help they need?

Answer: Proper care of victims of sexual assault is a top priority for the Department of the Navy, and I understand the Department has made significant strides in improving assistance to all victims of sexual assault, including those in deployed locations. The Department of the Navy has implemented the DoD Confidentiality policy and the restricted and unrestricted reporting options including the Collection of Forensic Evidence. Navy victim advocates now have the option of informing Commanders of restricted cases of sexual assault for active duty victims without providing identifying personal information. Victims of restricted cases of sexual assault are offered advocacy, medical and counseling services without triggering an investigation through law enforcement or command. I understand the Department of the Navy now provides 24/7 response capability for sexual assaults on the installation and during deployment by activating watchbills for victim advocates. If confirmed, I will continue to ensure the Department of the Navy remains committed to maintaining policies that ensure the proper care of sexual assault victims.

What is your view of the steps the Navy and Marine Corps have taken to prevent additional sexual assaults on female soldiers at their home stations and when they are deployed?

Answer: I am advised that the prevention of sexual assault has been a key issue for the Department of the Navy for some time. The Department of the Navy was a pioneer in the Sexual Assault prevention arena when it developed the Sexual Assault Victim Intervention (SAVI) and Marine Corps' Sexual Assault Prevention and Response Office (SAPRO) in 1994. Both programs are designed to support the victim, investigate fully and fairly, and continually evaluate and improve the programs. I understand that the Department of the Navy has uncompromisingly promoted victim assistance, awareness and prevention education, and reporting of sexual assaults.

The FY05 NDAA required implementation of a standardized DOD Sexual Assault Prevention program. I am told that the Department of the Navy is working closely with the DoD Joint Task Force for Sexual Assault Prevention and Response to standardize sexual assault prevention and identification responses across DoD. If confirmed, I will continue to support all efforts along the solid path of change followed by the Joint Task Force for Sexual Assault Prevention and Response, and continue to provide oversight in all areas under my authority to ensure the prevention of sexual assaults and protection of victims of sexual assault.

Whistleblower Protection

Section 1034, Title 10, United States Code, prohibits taking retaliatory personnel action against a member of the armed forces as reprisal for making a protected communication. By definition, protected communications include communications to certain individuals and organizations outside of the chain of command.

If confirmed, what actions will you take to ensure that senior military leaders understand the need to protect service members who report misconduct to appropriate authorities within or outside the chain of command?

Answer: The Department of Defense implements the Military Whistleblower Protection Act through Department of Defense Directive 7050.6, and the Department of the Navy further highlights the Act through its own Instruction at SECNAVINST 5370.7C that sets forth the protections afforded to military whistleblowers. If confirmed, I will act to ensure that military members whose actions are protected by the Act are not subject to illegal reprisals or retaliation. If a case of illegal reprisal comes to my attention, I will work to ensure that it is addressed in accordance with the law. I am advised that the Department of the Navy currently provides great emphasis on compliance with the Act by ensuring that all prospective commanding officers and executive officers are briefed on the Act's requirements, and addressing the Act's protections in the curriculum of eight separate courses of instruction for Navy and Marine Corps personnel. If confirmed, I will work to ensure that this emphasis on the Act in formal Department training courses continues.

Support to Navy and Marine Corps Inspectors General

What role, if any, do you think the General Counsel of the Navy should have in reviewing the investigations and recommendations of the Naval Inspector General and the Deputy Naval Inspector General for Marine Corps Matters?

Answer: If confirmed, I will establish a close and productive relationship with the Naval Inspector General and Deputy Naval Inspector General for Marine Corps Matters. As in other instances, I will cooperate with the Judge Advocate General of the Navy and Staff Judge Advocate to the Commandant of the Marine Corps as I cultivate that relationship. Independence is essential to the mission of the Inspector General, particularly with regard to the findings and recommendations that result from investigations. I believe that the General Counsel has an obligation, without infringing upon the Inspector General's independence, to provide independent and objective legal advice concerning the Inspector General's duties and responsibilities. Further, as part of his responsibility to review legal and policy issues arising from the Department of the Navy's intelligence and counterintelligence activities, the General Counsel should advise the Inspector General concerning proper reporting of the Department's intelligence oversight activities.

Civilian Attorneys

Judge advocates in the armed forces benefit from an established career ladder, substantial training opportunities, and exposure to a broad spectrum of legal areas and problems. By contrast, civilian attorneys in the military departments normally do not have established career programs and may do the same work for many years, with promotion based solely upon longevity and vacancies.

In your opinion, does the personnel management of civilian attorneys need changing? If so, what do you see as the major problems and what changes would you suggest?

Answer: During my time as Principal Deputy General Counsel, I found that the Department of the Navy offered unique opportunities to its civilian attorneys. The Office of the General Counsel, which is composed almost entirely of civilian attorneys, occupies a distinct place in relation to the Navy Judge Advocate General's Corps and the community of Marine Judge Advocates. Certain areas of practice – for example, business and commercial law – are reserved to the Office of the General Counsel as a matter of Departmental policy. In areas of practice that are common to the Office of the General Counsel and the military legal communities, civilian and uniformed attorneys generally represent different organizations within the Department. Thus, while the civilian and uniformed legal communities work together closely and constructively, there

are unique professional opportunities available to civilian attorneys. The opportunities for advancement to leadership positions within the Office of the General Counsel are substantial. There are a number of positions in the Senior Executive Service within the Office of the General Counsel, and numerous supervisory positions in organizations of all sizes around the globe. Competition for these positions, as for entry-level positions, remains robust. The Office of the General Counsel values a diversity of experience as a foundation for advancement to positions of leadership, and offers a range of practice sufficiently broad that attorneys may acquire that experience. Although I believe that the Office of the General Counsel offers rich opportunities for professional development, if confirmed, I will make sure that the Office of the General Counsel will continue to look for further ways to assist in the development of its civilian attorneys.

Environmental Issues

A number of major environmental statutes include national security exemptions. For example, section 7(j) of the Endangered Species Act states: “Notwithstanding any other provision of this chapter, the committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”

If confirmed as General Counsel, what role would you expect to play in determining whether it would be appropriate to exercise a national security exemption in connection with an activity or function of the Department of the Navy?

Answer: If confirmed as the General Counsel of the Navy, I would view my role as one of informing both the decision as to whether a national security exemption is necessary and appropriate and, in those few exceptional circumstances where it may be determined that an exception is appropriate, assisting the processing of the exemption to approval.

Where essential Navy operations or military readiness activities may be significantly compromised by application of the requirements of environmental law, it would be my role to advise senior decision makers on their legal options, including the possibility of pursuing available national security exemptions. Before recommending that an exemption be invoked or sought, however, I believe it would be imperative to look at the environmental requirement in light of the operation or military readiness activity being affected and to determine whether legal alternatives to an exemption may be available.

Under what circumstances do you believe that the use of such an exemption would be necessary and appropriate?

Answer: In crafting the exemptions that currently exist in environmental law, Congress has appropriately established a high hurdle, often requiring a Presidential determination,

based on the highest possible standard: that the exemption is necessary in the “paramount interest of the United States.” Such is the case, for example, under section 313(a) of the Clean Water Act, section 6001(a) of the Resource Conservation and Recovery Act, and section 118(b) of the Clean Air Act. From this standard, and from the limited duration for which exemptions may be granted, it is clear that Congress intended that exemptions should be invoked only in extraordinary circumstances. Such circumstances, I believe, include those where a particular environmental restriction poses a significant threat to military readiness or national security and no effective alternative exists that will allow compliance with the environmental requirement and still permit the critical military readiness activity to proceed.

In seeking an exemption, I believe the proponent must shoulder the burden of identifying not only the restriction imposed and its effect on military readiness, but also why the military training, testing, or operational activity cannot be modified to avoid a conflict with the environmental requirement without diminishing readiness. Moreover, where an exemption is invoked, I believe the proponent must identify what measures it is prepared to take to mitigate the environmental consequences of its actions.

Although I believe it important that the existing environmental exemptions be used only in exceptional circumstances, the focus of most exemptions on individual activities, facilities, or pollution sources makes them of limited suitability for some ongoing military readiness activities. To date, the Department of Defense has worked well and cooperatively with the regulatory community and other stakeholders to avoid impacts on these activities, which individually might not be significant, but which cumulatively could have large impacts on military readiness.

Please describe the circumstances that led to the decision to invoke the national security exemption of the MMPA.

The Secretary of Defense, after conferring with the Secretary of Commerce, recently invoked a National Defense Exemption (NDE) to the Marine Mammal Protection Act (MMPA) for a period of six months.

Anti-Submarine Warfare (ASW) proficiency – a highly perishable skill – requires quarterly qualification. Sustaining skill levels requires individual operator, unit, strike group and coalition training. Thirty-five exercises, on average, are conducted annually to achieve and maintain ASW proficiency. The current process for obtaining an authorization under the MMPA is inconsistent with realistic planning timeframes for several dozen exercises annually. My understanding is that it can take more than two years to plan and obtain an authorization for a single exercise.

As an alternative approach to an exercise-by-exercise process, we have discussed with the National Marine Fisheries Service (NMFS) programmatic approaches that would provide authorizations on a geographic level or for use of specific types of sonar. Navy remains cooperatively engaged with regulators in aggressively working toward full

compliance. The NDE was necessary to address challenges to specific exercises in the near term, and to serve as a bridge to full compliance. It allows Navy to ensure near-term ASW proficiency while cooperatively developing new processes for the long term. Application of the exemption was limited initially to six months to incentivize continued progress.

In addition to process issues, the National Resources Defense Council (NRDC) filed a lawsuit challenging Navy and Commerce Department compliance with the MMPA and sought a Temporary Restraining Order against the Navy's Rim of the Pacific (RIMPAC) exercise near Hawaii. The lawsuit alleged that, despite the lengthy and detailed process followed by Navy and NMFS to reach an Incidental Harassment Authorization under the MMPA, Navy and NMFS efforts failed to fully analyze impacts to marine mammals from the use of mid-frequency sonar. The Navy and NRDC settled the lawsuit the same week that the NDE was invoked.

A full report on the need for and scope of the exemption will be provided to the House and Senate Armed Services Committees as required under the MMPA.

How will invocation of the national security exemption alleviate those concerns?

Answer: An exemption will reduce but not eliminate all risk from lawsuits. It provides the Navy with the opportunity to resolve issues within the regulatory authorization process, enabling it to complete the analyses and regulatory steps necessary to obtain authorizations under the MMPA.

What does the Navy plan to do to ensure compliance with the MMPA in the future?

Answer: I understand that Navy is executing a prioritized program of environmental analyses to obtain regulatory authorization where necessary and to otherwise comply with applicable laws. During the exemption period, the Navy will continue to employ mitigation measures recommended by NMFS.

What impact did the NRDC lawsuit over MMPA compliance for the RIMPAC exercise have on the decision to invoke the MMPA's national security exemption?

Answer: The National Defense Exemption (NDE) executed by the Deputy Secretary of Defense on 30 June 2006 exempted all military readiness activities that employ mid-frequency active sonar during major training exercises or within established maritime ranges or operating areas from the requirements of the MMPA for six months. During this six-month period, all exempted activities are required to employ a suite of comprehensive mitigation measures. For RIMPAC 06, the NDE further specifies that the exercise will comply with the Incidental Harassment Authorization provisions approved by the National Marine Fisheries Service on 27 June 2006. The scope of the NDE,

therefore, includes RIMPAC 06, but is not limited to RIMPAC 06. The then-pending litigation was only one factor in the signing of the NDE. It is important to note that the NDE is designed to assist the Navy with its long-term MMPA compliance efforts and was not focused on the NRDC lawsuit alone.

What is the impact of the settlement of the RIMPAC lawsuit on future training exercises and military testing and evaluation using Navy sonar?

In October 2005, the Natural Resources Defense Council (NRDC) brought a programmatic challenge against the Navy's use of mid-frequency active sonar, challenging all past, present and future use of the sonar system. That case is still pending. The RIMPAC 06 lawsuit was a separate legal challenge brought by the NRDC on the eve of the training exercise. The settlement agreement with NRDC makes clear that the Agreement is not to be construed as a concession by either party as to the potential impacts of sonar on marine mammals, the validity of either party's factual or legal positions, or the extent of measures required to comply with environmental laws.

Congressional Oversight

In order to exercise its legislative and oversight responsibilities, it is important that this Committee and other appropriate committees of the Congress are able to receive testimony, briefings, and other communications of information.

Do you agree, if confirmed for this high position, to appear before this Committee and other appropriate committees of the Congress?

Answers: Yes.

Do you agree, if confirmed, to appear before this Committee, or designated members of this Committee, and provide information, subject to appropriate and necessary security protection, with respect to your responsibilities as the General Counsel of the Department of the Navy?

Answer: Yes.

Do you agree to ensure that testimony, briefings and other communications of information are provided to this Committee and its staff and other appropriate Committees?

Answer: Yes.